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No. 83-1216

In the Supreme Court of the United States

OCTOBER TERM, 1983

WILLIAM E. JONES, ET UX., ET AL.,
PETITIONERS

v.

PRESCOTT A. BERRY, DISTRICT DIRECTOR,
INTERNAL REVENUE SERVICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether an undercover operation by IRS criminal investigators was an unconstitutional "search."

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B1-B24) is reported at 722 F.2d 443. The opinion of the district court (Pet. App. A1-A40) is reported at 524 F. Supp. 645.

JURISDICTION

The judgment of the court of appeals (Pet. App. B1) was entered on October 24, 1983. A petition for rehearing (Pet. App. C1) was denied on December 20, 1983. The petition for a writ of certiorari was filed on January 23, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In January 1981, the Criminal Investigation Division of the Phoenix IRS office initiated the "Business Opportunity Project" (Pet. App. A2-A3). Its objective was to bring to light, by the use of IRS special agents acting undercover, violations of the tax laws by businesses in the Phoenix area. The agents were to pose as prospective purchasers or investors with a particular interest in businesses from which income might be "skimmed" and thus concealed from the IRS. The theory behind the program was that owners of businesses who had skimmed income would disclose that fact to prospective buyers, hoping to convince them that the company was more profitable than its books and tax returns suggested. Pet. App. A2-A3, A17-A18.

On January 10, 1981, IRS Special Agent Manning contacted a business broker and said that he wished to buy a company in the Phoenix area (Pet. App. A3). Manning indicated that he was especially interested in a business with a substantial cash flow susceptible to skimming (*id.* at A3-A4). The broker replied that he might have such a business (*id.* at A4).

At a subsequent meeting, the broker advised Manning that petitioner Acme Meat Company might suit his purposes (Pet. App. A4). After signing an agreement not to divulge information about Acme to anyone but professional advisors, Manning was allowed to examine Acme's corporate tax returns for 1976-1978 (*id.* at A4-A5). The broker then introduced Manning to petitioner William Jones, a shareholder and principal officer of Acme, at the business premises (*id.* at A5-A6). Manning was given a tour of the operation (*ibid.*).

On April 25, 1981, Manning again met Jones at Acme (Pet. App. A6). Manning was accompanied by IRS Special Agent Mason, who posed as his investment partner (*ibid.*).

Jones told the agents that he had been skimming income from Acme for some years (*id.* at A6-A7). Mason requested proof of the skim (*id.* at A7-A8). The three then went to Jones's residence, where petitioner Gladys Jones produced a five-by-six-inch piece of paper that purported to summarize the amounts skimmed from Acme during the preceding years (*ibid.*). In response to Mason's request for evidence supporting those figures, Mrs. Jones produced five large bundles of folded invoices, and proceeded to reconcile the invoices with the figures on the five-by-six-inch summary sheet (*id.* at A8).

On May 1, 1981, a federal magistrate, on the basis of Manning's affidavit setting forth the facts described above, issued a search warrant authorizing a search of the Joneses' residence and the seizure of specified documents (Pet. App. A9). The house was searched that same day (*ibid.*). After unsuccessfully demanding from the IRS return of all the books, records, and other items taken in the search, petitioners filed this action under Fed. R. Crim. P. 41(e) for return of property allegedly seized illegally.[1] Petitioners contended that the undercover activities of Agents Manning and Mason were "searches" prohibited by the Fourth Amendment, and that, under the "fruit of the poisonous tree" doctrine, the information obtained thereby could not provide a proper foundation for the warrant subsequently issued by the magistrate. Pet. App. A12-A13, A15-A16.

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[1] Rule 41(e) provides that "[a] person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property * * * which was illegally seized." The Rule provides that if a motion for return of property "is made or comes on for hearing * * * after an indictment or information is filed, it shall be treated also as a motion to suppress under [Fed. R. Crim. P.] 12." No indictment or information has been filed against petitioners in this case, in large part because the district court enjoined any use of the seized evidence against them.

The district court agreed with petitioners, holding that "the orchestrated ruse employed by the [IRS undercover agents] constitute[d] a search in violation of petitioners' Fourth Amendment rights" (Pet. App. A25). While recognizing that this Court has repeatedly sustained undercover operations against Fourth Amendment challenge (*id.* at A22-A23), the district court believed that the reasoning of those cases does not apply to undercover operations conducted by the IRS. In the district judge's view, the IRS is not "identical, or even substantially similar, to the FBI for purposes of analyzing the effect of undercover operations on Fourth Amendment rights" (Pet. App. A22). Whereas other undercover operations often involve contraband, as to which "there is a manifest public interest in preventing continuing crime and seizing items which pose a risk to [public] health and safety," noncompliance by a given taxpayer with the tax laws does not in the court's view "present[] a threat to the general health and welfare" (Pet. App. A22-A23). The court also questioned "the necessity for or value of undercover activities by IRS agents" (*id.* at A24), suggesting that "a taxpayer, whether complying or noncomplying, has a legitimate interest in marketing his business," and speculating that undercover operations might "interfere with the IRS' reliance on voluntary assessment and compliance by taxpayers" (*id.* at A23-A24). Having concluded that the warrant was based on information gleaned from an illegal search, the district court ordered the seized property returned to petitioners and permanently enjoined the government from using it as evidence "in any criminal proceeding against [them]" (*id.* at A39-A40).

The court of appeals unanimously reversed (Pet. App. B1-B24). It held that this Court's decisions in *Hoffa* v. *United States*, 385 U.S. 293 (1966), and subsequent cases "compel the conclusion that when, as here, undercover agents gain the confidence of one suspected of criminal

activity, and the suspect later voluntarily reveals to the agents evidence of crimes, he or she can have no expectation of privacy in the information so revealed" (Pet. App. B14-B15). The court thus held that the special agents' undercover operation was not a "search" (*id.* at B15, citing *Katz* v. *United States*, 389 U.S. 347 (1967)), and that the subsequent seizure of petitioners' documents pursuant to the warrant was valid.[2]

ARGUMENT

The decision below is correct. Contrary to petitioners' contention, there is no conflict among the circuits on the question presented. There is no basis for review by this Court.

1. The court of appeals correctly held that the IRS undercover operation was not a "search." The application of the Fourth Amendment depends on whether a person has "a legitimate expectation of privacy." *Smith* v. *Maryland*, 442 U.S. 735, 740, 744 (1979); *Katz* v. *United States*, 389 U.S. 347 (1967). "This Court consistently has held that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties." *Smith*, 442 U.S. at 743-744. The Fourth Amendment "does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and [that] the confidence placed in the third party will not be betrayed." *United States* v. *Miller*, 425 U.S. 435, 443 (1976). And the Fourth

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[2]The court of appeals also upheld the search of another building pursuant to petitioners' consent, concluding that their purported revocation of consent came too late to invalidate that search (Pet. App. B16-B20). Petitioners do not challenge that holding.

Amendment does not protect a person's "misplaced confidence" that a government informer "to whom he voluntarily confides his wrongdoing will not reveal it." *Hoffa* v. *United States*, 385 U.S. 293, 302 (1966).[3]

These decisions dictate the correctness of the court of appeals' result here. When asked by the special agents whether they were skimming from Acme, and whether they had business records documenting the skim, petitioners were not forced to respond affirmatively or, indeed, to respond at all. Rather, they voluntarily chose to reveal their wrongdoing in order to enhance their chances of selling their business (and thus to obtain further benefit from their wrongdoing). Even if petitioners entertained a subjective expectation of privacy concerning their disclosures — a dubious assumption — their expectation was not "reasonable" because they "assumed the risk" that the men with whom they spoke were themselves government agents, or were persons who might reveal their wrongdoing to government agents. *Smith*, 442 U.S. at 743-745.[4]

Petitioners' effort to avoid the impact of *Hoffa* and its progeny (Pet. 33-37) is unavailing. In petitioners' view, those cases stand merely for the proposition that "[s]ociety

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[3]Petitioners err in suggesting (Pet. 23-27) that the vitality of *Hoffa* was undercut by *Katz*. This Court has repeatedly reaffirmed *Hoffa* and its "misplaced confidence" rationale. *E.g.*, *Smith*, 442 U.S. at 744; *Miller*, 425 U.S. at 440, 443.

[4]Petitioners contend (Pet. 27-29) that the court of appeals erroneously considered *Hoffa* and its progeny as bearing upon the first prong of the *Katz* test (whether petitioners "exhibited an actual * * * expectation of privacy"), rather than upon the second prong (whether their alleged expectation of privacy was "one that society is prepared to recognize as reasonable"). Pet. 25-29 (original quotation marks omitted), quoting *Katz*, 389 U.S. at 361 (Harlan, J., concurring). Whether or not this contention is correct, the court of appeals properly held "that *Hoffa* and its progeny compel the conclusion" that the IRS undercover operation was not a "search" (Pet. App. B14), and any defect in the analytical process by which the court reached that conclusion would not be a basis for granting certiorari.

does not recognize as reasonable a criminal's expectation that he can engage in illegal transactions without the threat of governmental intrusion" (Pet. 33). Petitioners then seek to distinguish those cases from this one on the ground that, "[w]hile society has no interest in protecting illegal transactions, it has a substantial interest in protecting commerce and allowing disclosures necessary to convey legal businesses," such as the disclosures petitioners made in an attempt to sell Acme (*id.* at 35).

This argument is frivolous. Society scarcely has an interest in protecting the kind of disclosures petitioners made here, for those disclosures consisted of touting and documenting an illegal skimming operation in an effort to reap further benefit from the illegal conduct by encouraging a prospective successor to engage in similar activities. In any event, what makes an expectation of privacy "unreasonable" in the case of a communication to an informant is not that the communication itself literally is part of an illegal transaction. It is, rather, that the speaker "assumes the risk" that his interlocutor will disclose what is said, so that any subjective expectation of privacy the speaker may entertain is "unreasonable" in a normative sense. See, *e.g.*, *Smith*, 442 U.S. at 743-745.[5]

2. Contrary to petitioners' contention (Pet. 12-20), the decision below does not conflict with *United States* v. *Tweel*, 550 F.2d 297 (5th Cir. 1977). In *Tweel*, IRS civil investigators sought to examine a taxpayer's records in the custody of his accountant. In an effort to gain access to the

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[5]There is no merit to petitioners' suggestion (Pet. 31-32) that the Constitution requires government agents to have some basis for believing that unlawful conduct will occur before instituting an undercover investigation. See, *e.g.*, *United States* v. *Myers*, 692 F.2d 823 (2d Cir. 1982), cert. denied, No. 82-1255 (May 31, 1983); *United States* v. *Jannotti*, 673 F.2d 578, 608-609 (3d Cir.), cert. denied, 457 U.S. 1106 (1982).

records, the agents led the accountant to believe that no criminal investigation was pending, whereas they were in fact conducting their audit at the request of the Organized Crime and Racketeering Section of the Justice Department (550 F.2d at 298). The Fifth Circuit in those circumstances held that the accountant's consent to search of the records was procured by deceit, and hence that the search violated the Fourth Amendment (*id.* at 298-299).

The court below correctly distinguished *Tweel* (Pet. App. B22 n.5). It noted that, whereas the IRS examiners there had "abused the powers of their positions" by practicing deceit, the undercover agents here did not pretend to be civil examiners, hoping to secure petitioners' trust by virtue of their office, but rather "pretended to be fellow criminals" (*ibid.*). The Fifth Circuit itself has distinguished *Tweel* on precisely this ground. See *SEC* v. *EMS Government Securities, Inc.*, 645 F.2d 310 (1981). The Fifth Circuit there held that "[t]he key to [*Tweel* was] the nature of the relationship between the government agent and the private citizen," explaining that *Tweel* was based on a belief that "a private person has the right to expect that the government, when acting in its own name, will behave honorably," that an individual should be able to rely on the representations of a government agent who "seeks that individual's cooperation based on his status as a government agent," and that "it [is] clearly improper for a government agent to gain access to [otherwise unavailable] records * * * by invoking the private individual's trust in his government, only to betray that trust" (645 F.2d at 316). Since the undercover agents here obviously did not gain access to petitioners' records by virtue of their "status as * * * government agent[s]" or "by invoking [petitioners'] trust in [the] government," *Tweel* is distinguishable under the Fifth Circuit's own understanding of that case. Because there is thus no reason to believe

that the Fifth Circuit would have decided the present case differently from the decision below, there is no conflict in the circuits.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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